LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 30 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172

ELMER L. DIRKS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

vs.

W. L. BIRKHOLZ, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, WHO ARE EMPLOYED BY THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

LEE LEIBIK,
RUTH WEYAND,
343 South Dearborn Street,
Chicago, Illinois 60604,
Attorneys for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

TABLE OF CONTENTS.

	PAGE
Question Presented	1
Statement	3
The Nature of the Case	7
Summary of Argument	26
Argument	29
I. Subparagraph (c) of Section 2, Eleventh of the Railway Labor Act was drafted solely by the operating unions, was accepted by Congress without change and was uniformly given a literal interpretation by all operating unions, carriers, courts, administrative agencies and writers for fifteen years after its enactment	29
II. Both the negotiation of the major items in collective bargaining agreements applicable to operating employees and their administration is handled by all standard operating unions acting jointly so that membership in any one of them constitutes a sharing of the costs	35
III. A literal construction of subparagraph (c) of Section 2, Eleventh, affords a type of union security well suited to the needs of the operating employees	40
A. Traditional Forms of Union Security Have Historically Been Regarded as Unsuited to Operating Crafts on the Railroads	40
B. Prior to Consideration of Union Shop Amendments to the Railway Labor Act by Congress, a Multiple Choice Union Shop Had Been Suggested as a Possible Form of Union Security Suitable for Operating Employees on the Railroads	42

C. The Numerous Losses of Representation Rights by the Traditional Craft Union for Its Own Craft During the 1934 to 1950 Period Explains Why the Operating Union Refused to Support a Bill Which Did Not Guarantee Multiple Choice of Membership in Any One of the Standard Operating Unions..... 42

D. The Multiple Choice Union Shop Afforded by a Literal Construction of Subparagraph (c) Is Entirely Beneficial in Result..... 44

Conclusion 45

Appendix A.

Table of Cases Cited.

Akron, Canton & Youngstown Railway, 1 NMB 126, 127-129 (1938) 6

Alabaugh v. B. & O. R. Co., 125 F. Supp. 401 (D. Md.) aff'd 222 F. 2d 861 (4th Cir. 1955), cert. den., 350 U. S. 839 35

Brotherhood of Locomotive Firemen and Enginemen v. Northern Pacific Ry. Co., 279 F. 2d 641 (8th Cir., 1960) 35

Brotherhood of Railroad Trainmen v. O'Connell, 391 F. 2d 156 (2d Cir. 1968) 26, 29, 35, 36

O'Connell v. Erie Lackawanna Railroad Co., 391 F. 2d 156 (2d Cir. 1968) 26, 29, 35, 36

Pennsylvania Railroad Co. v. Rychlik, 352 U. S. 480 (1957) 22, 23, 32-33, 35, 37

Pigott v. Detroit, Toledo & Ironton R. Co., 221 F. 2d 736 (6th Cir. 1955), cert. den., 350 U. S. 833 35

Pittsburgh & Lake Erie R. R. Co., 1 NMB 115, 124 (1938) 6

Underwood v. Texas & P. Ry. Co., 178 S. W. 38 (Tex. Civ. App., 1915) 41

UROC v. Northern Pacific Ry. Co., 208 F. 2d 135 (9th Cir., 1953) cert. den., 347 U. S. 939 35

UROC v. Wyer, 115 F. Supp. 359 (S. D. N. Y. 1953), aff'd 205 F. 2d 153 (2nd Cir. 1954), cert. den., 347 U. S. 929 35

UROC v. Pennsylvania R. Co., 212 F. 2d 938 (7th Cir., 1954) 35

STATUTES CITED.

Federal Declaratory Judgment Act, 28 U. S. C. 2201.. 7

Railway Labor Act, 45 U. S. C., Sections 151 et seq. 7, 13, 15, 19, 21, 22

Section 1 19

Section 2 .....8, 23

Section 2, Third 16

Section 2, Eleventh 13, 23

Section 2, Eleventh (c)..... .....1, 4, 9, 16, 17, 23-29, 31-35, 37-40, 44, 45

Section 3 20

OTHER AUTHORITIES CITED.

96 Cong. Rec. 38, 39

Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2d Sess..... 41

Hearings before Committee on Rules, House, 73rd Cong., 2nd Sess., on H. R. 9861..... 40

Hearings before Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess..... 41

Hearings on H. R. 7789, 81st Cong., 2d Sess., House Committee on Interstate and Foreign Commerce..30, 40

Hearings on S. 3295, 81st Cong., 2d Sess., Senate Committee on Labor and Public Welfare.....30, 40

Kaufman, Jacob J., Collective Bargaining in the Railroad Industry (Columbia University 1954)..... 4

Report of President's Railroad Commission (1962).. 6

Seidman, Joel., The Brotherhood of Railroad Trainmen (J. Wiley and Sons, 1962).....3, 5, 34, 44

Toner, Reverend Jerome L., The Closed Shop in the American Labor Movement (Catholic University Press (1941) 41, 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS, INDIVIDUALLY AND AS GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

vs.

W. L. BIRKHOLZ, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, WHO ARE EMPLOYED BY THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED.

Whether Section 2, Eleventh (c) of the Railway Labor Act, 45 U. S. C. 152, Eleventh (c), should be construed literally so that full effect is given to its clear and un-

ambiguous language providing that membership of an operating employee in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership operating employees, satisfies the membership requirements of any collective bargaining agreement applicable to operating employees, without implying that the satisfying membership is limited to a labor organization which holds a contract for a craft or class in which the employee has an expectation of employment.

STATEMENT.

Inaccuracies in Petitioners' Statement.

Omissions and inaccuracies in the brief for petitioners require that a full statement be presented in this brief. Before doing so we here list the major inaccuracies in petitioners' statement so that in reading that statement this Court may be aware of its deficiencies. The following corrections should be made in petitioners' statement:

1. The statement in the second sentence on page 5 of petitioners' brief that through its General Grievance Committee the Trainmen "negotiates and administers comprehensive collective bargaining agreements setting forth the rates of pay, rules and working conditions for all the Milwaukee's yard service employees" is supported solely by a reference to paragraph 2 of the district court's findings at A. 103. In paragraph 2 the district court instead of finding that the Trainmen through its General Grievance Committee "negotiates and administers" found rather that it "is a party to collective bargaining agreements." The difference is of importance to this case because, as the district court found in paragraph 6 (A. 105), the Switchmen and the Trainmen have "participated" in "the negotiation of particular agreements affecting employees on all Class I railroads (Tr. 27, 31, 32, 33, 34, 83-84, 117-118, 124, 128-129)." The fact that wages, hours, fringe benefits and job protection have continuously since long before the union shop amendments been negotiated nationally by all five operating unions acting jointly[1] makes fully under-

1. The same authority which petitioners cite for their footnote to this sentence, Joel Seidman, The Brotherhood of Railroad Trainmen (J. Wiley and Sons, 1962), pp. 14-15, states, "Although certification under the Railway Labor Act as amended is for a

standable a literal reading of Subparagraph (c) of Section 2, Eleventh and establishes that members of the Switchmen on the Milwaukee bear their full share of financing the meaningful part of collective bargaining applicable to them and other yard employees on the Milwaukee.

2. The statement in the third sentence on page 5 of petitioners' brief that "These representation activities" are financially supported only by Trainmen members is supported solely by a reference to the same paragraph 2 of the district court's findings at A. 103. In paragraph 2 the district court, with respect to this matter, finds: "The activities of the General Grievance Committee receive *direct* financial support only from the membership of the Trainmen" (Emphasis supplied). The district court made no finding either directly or indirectly that the activities of the General Grievance Committee included the negotiation or administration of the agreements which govern the hours, wages and conditions of employment of the yardmen employed by the Milwaukee, and even as to the activities of the General Grievance Committee the district court qualified the finding of support to that directly given. The district court thus carefully refrained from finding that negotiation and administration are financially supported only by Trainmen members. The important part of administration carried on through the National Railroad Adjustment Board which is shared equally by Trainmen and Switchmen members would preclude such a finding, completely apart

craft or class of employees on a single railroad, the practice of bargaining on this basis has steadily diminished in importance. Regional bargaining was begun by the operating crafts in 1902; there were national agreements in the World War I period * * * and national bargaining or something close to it, has been engaged in on a craft or joint craft basis since 1931." See also Jacob J. Kaufman, Collective Bargaining in the Railroad Industry (Columbia University 1954), pp. 47-49, which lists by years the wage movements in which all five operating unions joined in national negotiations.

from the extensive and dominant role the joint national negotiations play in fixing all economic terms, as well as hours, vacations and a host of others, in the Milwaukee agreement. The record here also shows that the Switchmen participated in negotiating various agreements to which the Milwaukee is a party and the Switchmen help man national dispute committees to administer these agreements (A. 61-62, 71-75).

3. The quotation from Seidman in footnote 3 on page 5 of petitioners' brief to the effect that the general committee is "in charge of the collective bargaining and grievance work on that line" is misleading unless read in the context of Seidman's explanation that bargaining on single railroads "has steadily diminished in importance" so that "issues that would have an important impact on the competitive situation of one railroad in relation to one another are handled through national bargaining."[2]

4. In the first sentence on page 11 of petitioners' brief it is stated that "the district court found that SUNA members were 'free riders' ", citing paragraph 7 at A. 105. There is no such finding in that paragraph nor elsewhere. The district court made the more limited finding that SUNA members employed by the Milwaukee do not contribute a full share of financial support to the General Grievance Committee of the Trainmen.

5. The statement in the last full sentence of the text on page 7 of petitioners' brief that "SUNA is in a position to offer a cheaper membership" and the statement in the footnote that "Operating brotherhoods such as SUNA charge 'nominal' dues" are without any support in the record and we find no reference to the Switchmen's Union in the citation to page 257 of the House Hearings to which petitioners make reference. The reference to the

2. Seidman, *op. cit.*, pp. 14-15.

dues of the Trainmen's Union, which would be relevant if any claim of cheaper dues is considered, fixed at $1.50 for grand lodge dues, accompanied usually by an assessment of $1.00 monthly for the local lodge, plus grievance assessments of $1.50 to $3.00 per month, as shown by Seidman at the pages set forth in the Petition for Certiorari in this case, p. 3, n. 2, is omitted from the brief of petitioners on the merits in this Court.

6. If the statement in footnote 13, page 10 of petitioners' brief that "seniority operates solely within such services but not between train or yard service and engine service", is read as negating an ebb and flow between train and yard service, it is inaccurate. The Report of Presidents' Railroad Commission established by Executive Order No. 10891, issued February 28, 1962, p. 324, states, "The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during the same tour of duty) is in effect on a number of railroads. Many thousands of employees hold these rights." The National Mediation Board has often had occasion to note such dual seniority rights when it ruled that whether such an employee should vote in the yard craft or the road craft should be determined on the basis of the craft in which he spent the preponderant amount of time during the year preceding the election. See for example, *Pittsburgh & Lake Erie R. R. Co.*, 1 NMB 115, 124 (1938); *Akron, Canton & Youngstown Railway*, 1 NMB 126, 127-129 (1938).

THE NATURE OF THE CASE.

This suit was instituted by the filing in the district court of a complaint alleging that the Milwaukee Railroad and the Trainmen's Union had violated the Railway Labor Act (45 U. S. C. 151, *et seq.*) by entering into and threatening to discharge the named plaintiff employees and all other employees who were members of the plaintiff Switchmen's Union who were employed on the Milwaukee Railroad pursuant to a union shop agreement contrary to the express terms of that statute (A. 4-12). Declaratory relief, injunction and damages, were sought (A. 11-12). Jurisdiction in the district court was invoked under 28 U. S. C. 1337, conferring original jurisdiction on district courts of any civil action or proceeding arising under an Act of Congress regulating commerce, the Railway Labor Act being such an act (A. 4-5). Jurisdiction to grant declaratory relief was invoked under the Federal Declaratory Judgment Act, 28 U. S. C. 2201 (A. 5).

The Parties.

Plaintiffs consist of the Switchmen's Union of North America (herein called the Switchmen's Union) and six yard service employees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (herein called the railroad), who sue in their individual capacity and also as representatives of all members of the Switchmen's Union who are employed by the railroad (A. 5-6).

The defendants are the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Brotherhood of Railroad Trainmen, as well as appropriate officers of that labor organization who are sued both individually and as repre-

sentatives of a class composed of all members of the Brotherhood of Railroad Trainmen (A. 6-7).

The Switchmen's Union is a labor organization, national in scope[1], organized in accordance with the provisions of Section 2 of the Railway Labor Act (45 U. S. C. 152), and participates in the selection and designation of the labor members of the First Division of the National Railroad Adjustment Board (A. 6, 30, 42, 47, 48, 103). The plaintiff Switchmen's Union was organized in 1894 (A. 47). The Switchmen's first local on the Milwaukee Railroad was established in 1899, as Local 10 of the Switchmen's Union of North America, and has continued in existence at all times since that date (A. 48). As of November 14, 1966, the plaintiff Switchmen's Union was regularly receiving monthly dues from 471 yard service employees of the defendant railroad (A. 62-63) and had authorization cards from an additional 250 such employees (A. 49-50, 52, 76).

Local 10 had collective bargaining contracts with the Milwaukee covering various local yards of the railroad between 1899 and 1926, at which time the Railway Labor Act was enacted and was interpreted as abolishing all local yard units and requiring all bargaining units to be systemwide (A. 57).

The Switchmen's Union is the oldest railroad operating union affiliated with the AFL-CIO, having joined the American Federation of Labor in 1906, and having maintained a continuous membership with the AFL and its successor, AFL-CIO at all times since 1906 (A. 43).

The Switchmen's Union is organized on a craft or class basis and confines its membership and representation solely to the craft or class of yard service employees (A.

1. The national-in-scope status of the plaintiff Switchmen's Union was admitted by the Milwaukee Railroad in its answer (A. 6, 30) and stipulated by the Trainmen's Union (A. 42).

47). The craft or class of yard service employees as defined by the National Mediation Board includes yard foremen, helpers and switchtenders or switchmen (A. 75-76, 79). The Switchmen's Union holds exclusive representation rights and the collective bargaining contract for the craft or class of yard service employees on approximately 30 railroads in the United States each of which contracts contains union shop provisions which set forth the exact language of Section 2, Eleventh (c) of the Railway Labor Act as an exception to the requirement of membership in the Switchmen's Union (A. 47-49).

At all times since the 1934 amendments to the Railway Labor Act (48 Stat. 926), which resulted in setting up of the First Division of the National Railroad Adjustment Board with five members, one from each of the five operating crafts, the Switchmen's Union has been the nationally recognized spokesman for the craft or class of yard service employees on all railroads throughout the United States and as such at all times since 1934 has designated and paid the salary and expenses of the representative of this craft or class which sits on the National Railroad Adjustment Board on all cases affecting any operating employee (A. 6, 30, 47-48, 67-69). Since the labor members vote as a unit on cases before the National Railroad Adjustment Board (A. 48, 69) the Switchmen's Union shares in representing all operating employees on all railroads.

The Switchmen's Union has also been recognized as the national representative of the craft or class of yard service employees on numerous occasions when the President of the United States appointed the Presidential Rules Commission (A. 46, 71, 184), national arbitration boards (A. 46, 71) or national emergency boards dealing with issues applicable to all the railroads in the United States (A. 46, 71).

The Switchmen's Union, as the national representative of the craft or class of yard service employees, participated in the negotiation on a national basis with representatives of all Class I railroads in the United States (including the Milwaukee Railroad) and signed jointly with the other four standard railroad operating unions the Washington job protection agreement, amendments thereto and the National Vacation Agreement (A. 61-62, 72-75). The Switchmen's Union as the national representative of the craft or class of yard service employees, has appointed its executive vice president as a representative to the National Vacation Disputes Committee, which is a committee established by the five operating brotherhoods to decide disputes involving the application of the National Vacation Agreement to all employees of all Class I railroads, including the Milwaukee Railroad (A. 71-74). Representatives of the Switchmen's Union have met in conference with representatives of the Milwaukee Railroad with respect to the application of the Washington job protection agreement (A. 71). The Switchmen's Union cooperated with the other four operating brotherhoods in the 1959 National Rules dispute which lasted four years (A. 43, 45).

In addition, representatives of the Switchmen's Union serve on other national disputes committees which are made up of representatives of each of the five standard railway operating organizations (A. 45). These national disputes committees meet with representatives of all the Class I carriers (including the Milwaukee Railroad) for the purpose of negotiating and settling disputes as to the interpretations and applications of national agreements (A. 71).

The Switchmen's Union has also shared with the other four standard railroad operating unions the cost of litigation of issues affecting all of them (A. 45, 69).

The Switchmen's Union was a charter member of the Railway Labor Executives Association, commonly called RLEA, which was organized in 1926 (A. 43). The Switchmen's Union has continuously held membership in RLEA at all times since 1926 and is now a member (A. 43). RLEA is an association of the presidents of all the standard railway labor organizations, with the exception of one organization not presently a member (A. 44). RLEA functions to set policy in the railroad labor field (A. 44). RLEA determines to a large extent the national legislative program to be supported by railway labor (A. 44).

RLEA also represents railway labor on all matters coming before the Interstate Commerce Commission such as whether railroads should discontinue passenger lines or merge and what protection shall be provided for employees displaced or otherwise adversely affected by discontinuance of lines or mergers. (A. 44).

RLEA maintains a Washington office and staff (A. 44), and is financed by an assessment for its costs against each member organization based on per capita membership (A. 44). So part of the dues of each employee of the Milwaukee Railroad which are paid to the Switchmen's Union are subject to the per capita assessment to pay the expenses of the RLEA (A. 44).

The other plaintiffs named in the complaint are six yard service employees of the Milwaukee Railroad, who have seniority respectively of 25, 25, 26, 10, 9, and 15 years of employment with the Milwaukee Railroad as yard service employees (A. 5-6, 29). All the individual plaintiffs have for many years been and now are members of the Switchmen's Union and sued not only on behalf of themselves but also on behalf of approximately 500 members of the Switchmen's Union employed as yard service employees by the Milwaukee Railroad, who constitute a class too numerous

to join in person and whom plaintiffs fairly represent (A. 5-6, 29, 46-47). Many of the plaintiffs and the class they represent hold valuable insurance rights which depend on their continued membership in the Switchmen's Union, in that approximately 60 of the yard service employees of the defendant railroad are insured in the Equitable Life Assurance Society under Policy ADSD 16222 issued to them as members of the Switchmen's Union and some others are insured under Aetna Group Policy 7-47350, also issued to them as members of the Switchmen's Union, all of which constitute valuable property rights which will be lost if they are required to comply with the terms of the illegal union shop agreement entered into on February 1, 1967 between the Milwaukee Railroad and the Trainmen's Union, which requires them to join and maintain membership in the Trainmen's Union as a condition of employment, as hereinafter set forth (A. 9-10).

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company is a corporation organized and existing under the laws of the State of Wisconsin, which operates a railroad and is a carrier within the meaning of Section 1 of the Railway Labor Act (A. 7, 102-103). The defendant railroad employs 1175 employees in the craft or class of yard service, known variously as yardmen, yard foremen, helpers and switchmen (A. 49, 50, 76).

The Brotherhood of Railroad Trainmen has never been certified as the representative of the yard service employees of the Milwaukee Railroad but that railroad without requiring the Trainmen's Union to prove its majority, has recognized and bargained with the Trainmen's Union as the exclusive collective bargaining representative of all yard service employees of the railroad (A. 102-103).

The defendant Elmer L. Dirks is General Chairman of the General Grievance Committee maintained by the Train-

men's Union for Milwaukee Railroad's Lines East, and was sued both individually and as such general chairman (A. 7, 103). The complaint alleged that the members of the Trainmen's Union being so numerous as to make it impossible to bring them all before the court in person, the defendant Elmer L. Dirks as an officer of the defendant Trainmen's Union and as a member of the class will fairly ensure adequate representation of all members of the defendant Trainmen's Union for purposes of this suit (A. 7).

History of Prior Union Shop on Defendant Railroad.

Prior to the enactment of the Railway Labor Act in 1926 the Switchmen's Union had collective bargaining agreements with the Milwaukee Railroad governing terms and conditions of employment of yard service employees at various yards of the railroad (A. 57). Numerous yard service employees have at all times both before and after the enactment in 1926 of the Railway Labor Act, continued to be members of the Switchmen's Union and had never, prior to the signing of the illegal union shop agreement here involved, been members of the Trainmen's Union (A. 46, 55-56, 62-65, 69-71, 72-73).

Following the enactment of the union shop amendment to the Railway Labor Act in 1951 (64 Stat. 1238) which for the first time legalized a limited form of union shop for railroad employees (Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152, Eleventh), the Milwaukee railroad and the Trainmen's Union entered into a union shop agreement which as written permitted membership in the Switchmen's Union to satisfy the requirement of union membership (A. 82-83, 91). This union shop agreement was applied so as not to require any employee of the railroad to join or maintain membership in the Trainmen's

Union so long as they were members of the Switchmen's Union (A. 52-54).

Each of the plaintiffs W. L. Birkholz, Ray Granger and Thomas Foley has been a member of the Switchmen's Union continuously for the past ten years (A. 5). The other three individual plaintiffs have been members of the Switchmen's Union for shorter periods of time (A. 5-6).

The Switchmen's Union has at all times represented its members who are employed by the Milwaukee Railroad in the processing of their grievances with the railroad and in the handling of their cases before the National Railroad Adjustment Board (A. 57-61, 69-71, 71-73). Local officers of the Switchmen's Union handle these grievances initially with the designated local officer of the Milwaukee railroad and a national vice president of the Switchmen's Union handles these grievances on appeal with the highest designated officers of the railroad (A. 57-59, 69-70, 71-72).

As of November 14, 1966 the Switchmen's Union was receiving regularly monthly dues from 471 yard service employees employed by the Milwaukee Railroad (A. 55-56, 62-63). Some 250 additional yard service employees of the Milwaukee Railroad had signed authorization cards (A. 49-50, 52, 76) designating the Switchmen's Union as the employees' "representative in the handling of all matters relating to rates of pay, rules and working conditions, etc., arising under the Railway Labor Act as amended" (A. 51-52, 81).

Switchmen's Union Petition for NMB Election on Milwaukee Railroad Filed November 14, 1966.

On November 14, 1966, the Switchmen's Union filed a petition (A. 49-50, 75-76) with the National Mediation Board, herein called NMB, accompanied by cards signed by 718 yard service employees of the railroad designating the

Switchmen's Union as their authorized representative for purposes of the Railway Labor Act (A. 49-50, 75-76). The petition alleged that the Switchmen's Union had been designated as their representative for purposes of the Railway Labor Act by a majority of the yard service employees of the Milwaukee Railroad (A. 49-50, 75-76). The NMB was asked to certify the Switchmen's Union as the representative for purposes of the Railway Labor Act of all employees within the craft or class of yard service employees on the Milwaukee Railroad (A. 49-50, 75-76).

The petition was docketed by NMB as Case No. R-3895 (A. 51, 79-80) and, except for the occurrence of the events hereinafter described the NMB would, within the course of the next few months, have held an election to determine whether the yard service employees of the Milwaukee Railroad desire to be represented by the Switchmen's Union or by the Trainmen's Union (A. 8). A copy of the petition filed by the Switchmen's Union with the NMB, together with the correspondence from the NMB pertaining to the processing of this petition was introduced in evidence as exhibits (A. 49-51, 75-80).

Illegal Union Shop Agreement of February 1, 1967.

Two days after the foregoing petition was filed by the plaintiff Switchmen's Union, the defendant Trainmen's Union served notices on the defendant railroad seeking to modify and amend its union shop agreement dated June 9, 1953 (A. 100). In settlement of this notice the defendant Trainmen's Union and the defendant railroad entered into a union shop agreement dated February 1, 1967 (A. 54, 55, 92-100) for the purpose of influencing the results of the election to be conducted by the NMB in favor of the defendant Trainmen's Union and to the disfavor of the plaintiff Switchmen's Union, by requiring all employees in

the craft or class of yard service to join and maintain membership in the defendant Trainmen's Union within 60 days after the effective date of the agreement, without providing that as to all employees covered by said agreement membership in any other labor organization national in scope which admits to membership employees within the craft or class of engine, train, yard or hostling service shall satisfy the requirement of membership as required by said agreement although Section 2, Eleventh (c) of the Railway Labor Act excepts from the ban of Section 2, Third, only agreements which permit such alternate membership (A. 8, 9, 54-55, 92).

The pertinent provisions of said union shop agreement are as follows (A. 54, 55, 92-93):

> "Section 1.
>
> "(a) * * * all employees of the company * * * except as hereinafter provided, shall, as a condition of their continued employment * * * become members of the Brotherhood within sixty calendar days * * * and thereafter shall maintain membership in the Brotherhood; * * *
>
> (b) It is agreed, as a condition of continued employment, all employees of the company shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, having a labor contract with the C. M. St. P. & P. Railroad Company (lines East) covering employees of a class or craft in train or yard service; provided, However, that nothing contained in this agreement shall prevent any employee from changing membership from one organization to another labor organization, having a labor contract with the C. M. St. P. & P. Railroad Company (Lines East), covering employees of a craft or class in train or yard service; provided, further, however, that the right of a yardman, who does not hold interchangeable rights, to acquire or hold membership in an organization shall be confined to the Brotherhood."

The effect of the above quoted proviso clauses of Section 1 (b) of said union shop agreement is to require all employees in yard service to join and maintain membership in the defendant Trainmen's Union because the plaintiff Switchmen's Union does not have any labor contract with the defendant railroad (A. 8, 104). Some of the yardmen employed by the defendant railroad do not have interchangeable rights to serve in road service and hence for this additional reason would be within the language of the illegal portions of this union shop agreement and would illegally be required to join and maintain membership in the defendant Trainmen's Union, unless the agreement is declared illegal and its enforcement enjoined (A. 8, 103-104).

The effect of Section 1 of said union shop agreement is to require all of the plaintiffs, and all of the other members of the class they represent, to cease being members of the plaintiff Switchmen's Union and to become and remain members of the defendant Trainmen's Union or be discharged from their employment with defendant railroad (A. 8-9, 104).

The complaint alleged that Section 2, Eleventh (c) of the Railway Labor Act (45 U. S. C. 152, Eleventh (c)) grants all yard service employees the unqualified right to belong to any labor organization national in scope which admits yard service employees to membership without any limitation that such labor organization must have a labor contract with the employer and without any limitation that the employees must have interchangeable rights (A. 8-9). By denying plaintiffs the right to belong to any labor organization national in scope which admits yard service employees to membership, the union shop agreement of February 1, 1967, between defendant Trainmen's Union and defendant railroad violates Section 2, Third, of the Railway Labor Act (45 U. S. C. 152, Third).

Proceedings in the District Court.

The agreement by its terms became effective on March 1, 1967 (A. 100). The complaint herein was filed on February 23, 1967 and plaintiffs on the same day applied to the district court for a restraining order which would have postponed the effective date of the agreement *pendente lite* (A. 1, 109-110). The district court denied the motion for a restraining order (A. 1, 109-110). On March 1, 1967, the plaintiffs filed a motion for preliminary injunction to enjoin the enforcement of the union shop agreement *pendente lite* (A. 1). The district court refused to rule on the motion for preliminary injunction until he could conduct a trial. The trial on the motion for preliminary injunction was set for April 3 and 4, 1967, and the district court ruled that he would consolidate the trial on the merits with the hearing on the motion for preliminary injunction (A. 41-42).

When the union shop agreement became effective on March 1, 1967 all the yard service employees who were members of the plaintiff Switchmen's Union joined the defendant Trainmen's Union in order to avoid losing their jobs. Some 400 of these employees who prior to March 1, 1967, had been regular dues paying members of the plaintiff Switchmen's Union could not afford to pay the initiation fees and dues required by the defendant Trainmen's Union and at the same time pay dues to the plaintiff Switchmen's Union (A. 10, 55-56, 64-65). By the time the trial of this case in the district court took place on April 3 and 4, 1967, approximately 400 employees who prior to March 1, 1967 had regularly been paying dues to the plaintiff Switchmen's Union ceased to be members of the plaintiff Switchmen's Union and ceased to pay dues to the plaintiff Switchmen's Union solely because they were required by said union shop agreement to pay an initiation

fee and dues to the defendant Trainmen's Union in order to hold their jobs with the defendant railroad (A. 55-56, 64-65).

Each of the plaintiffs and each of the other members of the class they represent, has valuable seniority rights which entitles him to preferential employment by the defendant railroad, which constitute valuable property rights which will be lost in the event of a discharge for failure to join and remain a member of the defendant Trainmen's Union as required by said agreement of February 1, 1967 (A. 10).

The complaint contains the requisite allegations as to irreparable damage, inadequacy of other remedies and necessity for equitable relief (A. 11).

Findings of Fact, Conclusions of Law and Judgment of the District Court.

On May 24, 1967, the district court made the following findings of fact and conclusions of law (A. 102-108).

The defendant railroad is a carrier within the meaning of Section 1 of the Railway Labor Act, 45 U. S. C. 151 (A. 102-103). The defendant Trainmen's Union is the representative of the yard service employees of the defendant railroad (A. 102-103). The defendant Trainmen's Union, through its General Grievance Committee, is a party to collective bargaining agreements with the defendant railroad setting forth rates of pay, rules and working conditions for all yard service employees of the defendant railroad employed on Lines East (A. 103). The activities of the General Grievance Committee receive direct financial support only from the membership of the defendant Trainmen's Union (A. 102-103).

Both the plaintiff Switchmen's Union and the defendant Trainmen's Union are among the five "standard" operating organizations qualified to select or designate members

of the National Railroad Adjustment Board, First Division, as provided in Section 3 of the Railway Labor Act, 45 U. S. C. 153 (A. 103). On November 14, 1966, under the terms of the union shop agreement then in effect between the defendant Trainmen's Union and the defendant railroad, a number of the yardmen in the bargaining unit represented by the Defendant Trainmen's Union, including the five[2] individual plaintiffs, held membership in the plaintiff Switchmen's Union (A. 103).

On February 1, 1967, the defendant Trainmen's Union and the defendant railroad modified their union shop agreement to require membership in the defendant Trainmen's Union of all yardmen except those holding employment rights in another craft or class and to limit alternate membership for such persons to organizations having a labor agreement with the defendant railroad covering employees in its train or yard service (A. 103-104). The plaintiff Switchmen's Union has no labor agreement with the defendant railroad (A. 103-104). Membership in the plaintiff Switchmen's Union will not satisfy the obligations imposed upon yardmen by the February 1, 1967, union shop agreement (A. 103-104).

The plaintiff Switchmen's Union and the defendant Trainmen's Union help finance activities of the Railway Labor Executives Association, a private organization of the presidents of the "standard" railroad labor unions to formulate and sponsor national leglislative and policy programs of common concern (A. 104-105). Both the plaintiff Switchmen's Union and the defendant Brotherhood have represented their respective memberships on various boards and committees and have participated in litigation and the negotiation of agreements affecting employees on all Class I railroads (A. 104-105).

---

2. The reference to five seems to have been a typographical error as nothing in the record indicates any difference between the six individual plaintiffs in this regard.

The district court found that although in several instances the plaintiff Switchmen's Union had chosen to process cases before designated officers of the defendant railroad and before the National Railroad Adjustment Board for individual members of the plaintiff Switchmen's Union employed by the defendant railroad who otherwise the defendant Trainmen's Union would have to represent, the members of the plaintiff Switchmen's Union employed by the defendant railroad do not contribute a full share of the financial support to the General Grievance Committee of the defendant Trainmen's Union for the performance of its functions under the Railway Labor Act (A. 105).

On November 14, 1966, the plaintiff Switchmen's Union applied to the NMB for a representation election among yardmen employed on the eastern and western lines of the defendant railroad, but no such election has been ordered or scheduled by the NMB (A. 105). The plaintiff Switchmen's Union is competing with the defendant Trainmen's Union for the allegiance of the yardmen and seeks to supplant the defendant Trainmen's Union as their statutory bargaining representative (A. 105).

The district court found that evidence does not demonstrate that the defendant railroad and the defendant Trainmen's Union modified their union shop agreement for the purpose of influencing the outcome of any election that the NMB may conduct because the new union shop agreement dated February 1, 1967 applies only to Lines East and the Lines West agreement does not prohibit membership in the plaintiff Switchmen's Union (A. 105).

Conclusions of Law of the District Court.

The district court held that it had jurisdiction of the case on three grounds: (1) under the Railway Labor Act, 45 U. S. C. 151, *et seq.*, and under 28 U. S. C. 1337, the district court has jurisdiction to determine the validity of union shop agreements; (2) the district court has jurisdiction to determine whether the union shop agreement of February 1, 1967, was entered into by the defendants for the purpose of influencing the outcome of a representation election to be conducted by the NMB; (3) since the complaint involves a dispute between certain employees of the defendant railroad and their bargaining representative it is within the jurisdiction of the district court notwithstanding joinder of the railroad employer (A. 106).

The district court held that the language of Section 2, Eleventh (c) cannot be literally applied because to do so would give it a broader application than the accepted purpose of the statute to eliminate the "free rider" who did not support his representative's functions under the Act (A. 106-107). Since the defendant Trainmen's Union is the statutory representative of the yardmen here involved, it was the Trainmen's Union, and not the Switchmen's Union, which was the "object of Congressional concern" (A. 107).

The district court quoted the *obiter dictum* of the Supreme Court in *Pennsylvania* v. *Rychlik*, 352 U. S. 480, 492 (1957), that "The only purpose of Section 2, Eleventh (c) was a very narrow one—to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts" (A. 107). From this *obiter dictum* the district court concluded that the February 1, 1967, union shop agreement "adequately meets the narrow problem of intercraft mobility by permitting alternative membership for yardmen holding em-

ployment rights in another craft or class, namely those with interchangeable rights, and in unions that have contracts with the Carrier covering the other craft or class involved" (A. 107).

The district court buttressed its conclusion that the plaintiff Switchmen's Union was not intended to be protected by Section 2, Eleventh of the Railway Labor Act by quoting out of context the further *obiter dictum* from the *Rychlik* case (352 U. S. 480, 488-489, 494) which the district court paraphrased as stating that it was not the purpose of Congress in Section 2, Eleventh (c), "to help dissident or rising new unions recruit new members" or to permit "employees to choose between membership in (their bargaining representative) and another competing union" (A. 107). The district court concluded that the plaintiff Switchmen's Union, "a rival organization without a labor agreement covering a craft or class to which yardmen employed by the carrier may be transferred, is not within the intendment of the statute" (A. 107).

The fact that the plaintiff Switchmen's Union, on the same basis as the defendant Trainmen's Union, "is qualified to select or designate members of the National Railroad Adjustment Board or participates in other activities of concern to railroad labor generally" was not regarded by the district court as sufficient to "bring" the plaintiff Switchmen's Union or its members "within the alternative union protections of Section 2, Eleventh (c) in the absence of a showing that they face the problem of intercraft mobility" (A. 107).

The district court ruled that since it had determined that the February 1, 1967 agreement is lawful, its execution and enforcement do not constitute unlawful coercion, interference or influence under Section 2 of the Railway Labor Act, U. S. C. 152 (A. 108). The district court accord-

ingly held that the defendants have not violated any of the provisions of the Railway Labor Act (A. 108) and therefore the plaintiffs failed to show any irreparable injury or any damages (A. 108).

Judgment of the District Court.

On May 24, 1967, the district court entered judgment dismissing the complaint on the merits and awarding the defendants their costs (A. 110).

Opinion of the Seventh Circuit Court of Appeals.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed (A. 111-121). It held that "the literal reading of Sec. 2, Eleventh (c) expresses the intention of Congress as demonstrated by the legislative history of the Act" (A. 115). Concededly the union shop agreement here involved violates Section 2, Eleventh (c) read literally (A. 114). This union shop agreement "requires two conditions, in addition to the national in scope requirement of the Act, before alternate union membership is permissible" (A. 115). These two conditions are that the union have a contract with the railroad and that the employee have interchangeable employment rights in the craft represented by the alternate union (A. 115). Since the Switchmen's Union does not have any contract with the Milwaukee and since most yard service employees do not have interchangeable rights, this contract does not permit alternate membership in the Switchmen's Union (A. 115).

The Seventh Circuit reviewed the legislative history of Section 2, Eleventh (c) and pointed out that Congress had rejected a proposal of the Trainmen's Union which would have limited alternate union membership to unions hold-

ing contracts and to employees holding interchangeable rights (A. 115-118). The Court concluded (A. 118):

> "We think it would be absurd to interpret away the literal language of 2 Eleventh (c) by reading it as though it said almost exactly what was said in a proposal which was rejected at committee hearings and which places members of SUNA—organized under the Act and national in scope and covering the craft of yard services—in the dilemma of choosing between compulsory dual unionism or a compulsory change from their own craft union to the Trainmen. Each horn of this dilemma was rejected by Congress in 1950."

In addition the Seventh Circuit listed three other considerations which supported a literal interpretation of Section 2, Eleventh (c), namely, the Trainmen's construction would "render the second proviso of 2 Eleventh (c) devoid of any meaning" (A. 118-119); the uncertainties attending the scope of permissible alternate membership would place a burden on each employee of establishing his intercraft rights and impose on federal courts in connection therewith the necessity of making "ad hoc adjudications in a large number of individual cases" (A. 119); and the "contemporaneous interpretation of this Section by the operating craft brotherhoods" for fifteen years in a literal fashion (A. 119-120).

SUMMARY OF ARGUMENT.

The Argument section of the brief of respondents in the companion case of *Brotherhood of Railroad Trainmen* v. *O'Connell*, No. 158, this term is adopted by reference and is not repeated here. Only additional argument to answer further points made by the petitioners in this case are presented in this brief.

Subparagraph (c) of Section 2, Eleventh of the Railway Labor Act was drafted by the operating unions themselves and adopted by Congress in the language drafted by the operating unions. On the floor of Congress it was substituted for an amendment unanimously reported by both the Senate and House Committees which would have guaranteed all employees, operating and non-operating alike, the right to satisfy the membership requirements of any union shop agreement by membership in any labor organization without any requirement of joining or maintaining membership in the contracting union. All remarks on the floor of Congress that the language of subparagraph (c) was intended to accomplish the same purpose as the committee amendment must be read as having reference to the amendment giving unlimited alternate membership choice. So read the conclusion follows that Subparagraph (c) was intended to operate in accordance with its plain and unambiguous literal language.

A literal reading was followed for fifteen years by the unions which drafted Subparagraph (c). Also all carriers, courts, administrative agencies and writers without exception read and applied Subparagraph (c) literally. It must be assumed the draftsmen knew what they meant when they set down on paper the clear and unambiguous provision of Subparagraph (c).

The prevalent and long continued practice of all operating unions in joining to bargain collectively on a national basis with respect to all economic issues, and with respect to many non-economic issues, as well as to administer all agreements, means that membership in any one of the operating unions serves to support financially the collective bargaining activities which realistically determine wages, hours and conditions of employment of all operating employees. No employee who is a member of any operating union is a free rider, irrespective of whether or not his union holds a contract on the particular carrier on which he is employed.

Congress regarded only those employees who belonged to no union as free riders. As members of Congress stated on the floor of Congress during the debate preceding the enactment of Subparagraph (c), the bill was directed at those employees on the railroads who did not belong to any union. Only those employees were required by Subparagraph (c) to join the contracting union. And even they, as well as all other members, may change membership to any other union national in scope once they have joined the contracting union.

A literal reading of Subparagraph (c) affords a type of union shop peculiarly appropriate to the situation of railroad operating employees. Because operating employees usually hold seniority rights in more than one craft, union security agreements with bona fide unions of railroad employees were practically non-existent even prior to the illegalization of union security by the 1934 amendments to the Railway Labor Act. Only 23 agreements were then in existence and these were percentage contracts, which required only a percentage of the employees covered by the contract to belong to the contracting union. The percentage was usually 75 percent. The historical precedent of this type of contract suggests that the draftsmen of Sub-

paragraph (c) were familiar with the partial union security contract and explains that its literal language was deliberate and well considered.

As early as 1941, Reverend Toner, in his authoritative work on closed shop contracts, after commenting on the problems of dual craft seniority which made traditional union security unworkable, advanced the multiple choice union security agreement as a logical solution to the problem.

The 544 instances during the 15 years preceding the enactment of the union shop amendments in which, as shown by the Annual Reports of the National Mediation Board, the traditional craft union, primarily as the result of shifts of employees from one craft to another due to economic forces and not to the change of union affiliation, lost its representation rights to another operating union, had established a practice of tolerance for enclaves of minority union membership. Subparagraph (c) was drafted in a manner which avoided upsetting this practice.

The freedom of choice of operating unions serves the beneficial function of increasing the consideration which the union affords its members.

A literal reading is not only compelled by the legislative history and contemporaneous application, but also by the beneficial results which thereby are achieved.

ARGUMENT.

In the companion case, *Brotherhood of Railroad Trainmen* v. *O'Connell,* No. 158, this Term, the Brief for Respondents, pp. 20-37, set forth in chronological sequence the legislative history of Subparagraph (c) of Section 2, Eleventh of the Railway Labor Act. Because these cases have been set down for argument together, we do not here repeat, that legislative history or any of the other arguments with respect to the interpretation of Section 2, Eleventh (c) there set forth but incorporate the Argument portion of that brief herein by reference. Copies of the Brief for Respondents in *BRT* v. *O'Connell,* No. 158, this term, have been served on all parties to this case.

I.

SUBPARAGRAPH (c) OF SECTION 2, ELEVENTH OF THE RAILWAY LABOR ACT WAS DRAFTED SOLELY BY THE OPERATING UNIONS, WAS ACCEPTED BY CONGRESS WITHOUT CHANGE AND WAS UNIFORMLY GIVEN A LITERAL INTERPRETATION BY ALL OPERATING UNIONS, CARRIERS, COURTS, ADMINISTRATIVE AGENCIES AND WRITERS FOR FIFTEEN YEARS AFTER ITS ENACTMENT.

When the amendment setting forth the present language of Subparagraph (c) was presented to Congress it was described as the language which had been drafted by the operating unions themselves and upon which they all agreed except the Brotherhood of Locomotive Engineers (96 Cong. Rec. 16261, 16330).

Congress found no need to make any changes in this language. If all the unions involved were agreed upon

a solution which, literally read, met the objections which the railroads had raised, there was certainly no need for Congress to do other than adopt it without making any careful legislative documentation of congressional intent. The railroads had called the attention of Congress to the prevalence of minority enclaves in the operating crafts. Daniel P. Loomis, testifying on behalf of the Association of American Railways, had voiced as one objection to the union shop amendment as proposed in the original bill, the problems which would face railroads if they tried to abolish historically existing practices of the majority union tolerating membership in a minority union. He testified (House Hearings, p. 159; Senate Hearings, p. 315):

> "In other instances, possibly 60 percent of the employees in a particular craft belong to one organization and the other 40 percent to another organization. Under this amendment they would all be forced to join the organization holding the contract without any regard to the preservation of such brotherhood benefits and insurance benefits as they may have by reason of their present membership in another organization. This is particularly true among the operating crafts, where employees may work as firemen today and engineers tomorrow, or as trainmen today and conductors tomorrow. Thousands of employees move back and forth in these classes with the rise and fall of business and any attempt to dictate a union shop would result in utter chaos."

Mr. Loomis pointed to the related fact that the balance between majority and minority union changes frequently, which again would give rise to chaotic situations if the traditional form of union shop were adopted. He testified (House Hearings, pp. 161, 172; compare Senate Hearings, p. 318):

> "Frequently in the railroad industry there are changes in the duly authorized representative and the organization would probably insist upon an agreement which

would upon such change in representation result in all of the employees of the craft or class involved being required to join another organization.

* * * * *

"You have a situation on representation that, on some properties and other crafts is very close. For example, one of the railroads * * * according to the records of the last election held, they would indicate that about 55 percent of the yard men on that railroad belonged to the switchmen's union and the other 45 percent belonged to the Brotherhood of Railroad Trainmen. That contract happens to have changed hands I think twice in recent years.

"With a union shop, I take it that the 45 percent that belonged to the Brotherhood of Railroad Trainmen, and who hope to reestablish the majority that they held 3 or 4 years ago, would be required to join the switchmen's union * * *."

The table annexed at the end of our brief an as appendix confirms the testimony of Mr. Loomis as to the frequency of such changes immediately preceding the consideration by Congress of the union shop amendment.

When the operating unions agreed upon the language which is now Subparagraph (c), both the Senate and the House Committees had unanimously agreed upon a proviso which would have guaranteed every railroad employee, both non-operating and operating, the right to satisfy the membership requirements of a union shop agreement by membership in any labor union, without qualification. Hence the proposal to limit only union shops applicable to operating crafts and even as to them to limit the satisfying membership to standard unions, could not have been viewed by Congress as other than a refinement of its proposal that membership in any union satisfy union shop requirements.

That all the operating unions and all the carriers understood that Subparagraph (c) was intended to be read

literally is confirmed not only by their uniform practice of writing all contracts signed from 1951 to 1966 to include the express language of Subparagraph (c) but by their explanation of that Subparagraph to Congress in their briefs in *Pennsylvania Railroad* v. *Rychlik,* 352 U. S. 480 (1957). There is not a single word in any of the briefs for the carrier or the operating unions, all of whom filed briefs either through the RLEA or individually, that Subparagraph (c) was limited to temporary shuttling back and forth, or that membership had to be in a contracting union.

The Brotherhood of Railroad Trainmen in its brief in *Rychlik,* No. 56, October Term, 1956, pp. 28-29, stated:

> "The 'national in scope' language of Section 2, Eleventh (c) emphasizes the right of a union 'national in scope' to enlist employees on the basis of its privileged status and to insure them that membership therein satisfies the union shop requirement. This language in terms of the right of individuals, means only that they have the right not to be discharged if they belong to a union that has qualified itself as 'national in scope'."

In the brief of the Brotherhood of Locomotive Engineers filed as amicus curiae in the *Rychlik* case, No. 56, October Term 1956, pp. 12, 25, they state:

> "When a union shop agreement authorized by the 1951 amendments of the Railway Labor Act has been entered into between a carrier and the representatives of a craft of operating employees, all employees in the craft are required to become members of the craft union or of another union admitting members of such craft which is national in scope and organized in accordance with the Railway Labor Act. * * *
>
> * * * * *
>
> "* * * the phrases 'national in scope' and 'organized in accordance with the Act' include the requirement that such union shall be required to assume its

duty of establishing its eligibility to participate in the selection of members of the National Railroad Adjustment Board. Before it has so established its eligibility, it has not established its due responsibility under the Act. To conclude otherwise would create an immunization of the 'free rider' status of the members of such a nonparticipating labor organization, and thus defeat the underlying principle of the Union Shop Amendment."

The Brief of the Railway Labor Executives' Association as amicus curiae, in *Rychlik,* No. 56, October Term, 1956, pp. 4, 9, states:

> "No individual rights are contravened by a construction of the statute as permitting the execution of union security agreements which limit the employee's choice of union membership to either the certified bargaining agent, or an organization which has established its 'national in scope' status * * *
>
> "* * * the individual's right * * * is simply to be exempt from the requirement of membership in the organization holding the union shop agreement if he is a member of another organization which already has established its qualifications under Section 2, Eleventh (c)."

The Brief for the Pennsylvania Railroad Company, in *Rychlik,* No. 56, October Term 1956, pp. 26-27, 41, states:

> "When a railroad employee is cited for non-compliance with a union shop agreement his defense to such a charge must necessarily fall into one of the following categories: (1) proof that the required payments were tendered; (2) proof that his membership in the union has been denied or terminated for some reason other than failure to tender the required payments to the union; or (3) if he is an employee in engine, train, yard, or hostling service, proof that he is a member of some other labor organization, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service. If

> the employee can prove that his case falls within any of the foregoing categories he has shown that he is in compliance with the union shop agreements permitted by the Railway Labor Act.
>
> * * * * *
>
> "* * * an individual employee * * * acts at his peril when with knowledge of the provisions of the union shop agreement and of the Railway Labor Act he terminates membership in the union which is his collective bargaining agent and joins another union. If the other union is not already recognized and established as a union national in scope and otherwise qualified under Section 2, Eleventh (c) of the Act, the employee, even if he believes in good faith that the other union is national in scope, has placed himself beyond the protection of the union shop agreement and the Railway Labor Act."

Joel Seidman in his authoritative work on the Brotherhood of Railroad Trainmen (John Wiley & Son, 1962), which petitioners cite in their brief, pp. 5, 9, and which was written with the cooperation of the Trainmen, as appears in the preface to the book, states, pp. 16-17:

> "In 1951 * * * the railroad unions persuaded Congress to amend the Railway Labor Act to legalize the union shop * * * the provision was written with respect to engine, train and yard service, to require union membership, not necessarily in the union units bargaining rights, but in any union that was national in scope and admitted members of the particular craft or class. Employees were thus allowed to change from one organization to another, despite the negotiation of a union shop clause. * * *
>
> "Where the Brotherhood has a union shop clause in effect, therefore, a worker may hold his job by belonging to the unions of the Conductors or the Switchmen, if for any reason he finds the Trainmen's organization not to his liking. This gives the member a certain independence in his relation to the union and forces the officers to be more responsive to the desires of the membership and more considerate of their feelings than they otherwise might be."

In the whole series of cases involving UROC during the 1950's no union and no carrier ever suggested that membership in UROC was deficient because UROC held no contracts. In addition to the *Rychlik* case, see *Pigott* v. *Detroit, Toledo & Ironton R. Co.*, 221 F. 2d 736 (6th Cir. 1955), certiorari denied 350 U. S. 833; *Alabaugh* v. *B&OR Co.*, 125 F. Supp. 401, 407 (D. Md.), affirmed, 222 F. 2d 861 (4th Cir., 1955), certiorari denied 350 U. S. 839; *BLF&E* v. *Northern Pac. Ry. Co.*, 279 F. 2d 641 (8th Cir., 1960); *UROC* v. *Northern Pac. Ry. Co.*, 208 F. 2d 135 (9th Cir., 1953), certiorari denied, 347 U. S. 939; *UROC* v. *Wyer*, 115 F. Supp. 359 (S. D. N. Y. 1953), affirmed, 205 F. 2d 153 (2d Cir., 1954), certiorari denied, 347 U. S. 929; *UROC* v. *Pennsylvania R. Co.*, 212 F. 2d 938 (7th Cir., 1954).

In view of this uniform literal interpretation of Subparagraph (c) by the whole railroad industry, including the Trainmen who participated in drafting the language, we submit the court below and the Second Circuit in the *O'Connell* case were correct when they adopted a literal interpretation.

II.

BOTH THE NEGOTIATION OF THE MAJOR ITEMS IN COLLECTIVE BARGAINING AGREEMENTS APPLICABLE TO OPERATING EMPLOYEES AND THEIR ADMINISTRATION IS HANDLED BY ALL STANDARD OPERATING UNIONS ACTING JOINTLY SO THAT MEMBERSHIP IN ANY ONE OF THEM CONSTITUTES A SHARING OF THE COSTS.

The record in this case shows that although the Switchmen's Union does not hold the contract for yard service employees on the Milwaukee, the Switchmen's Union has bargained collectively with the Milwaukee on a national basis as part of negotiations conducted by the operating unions acting jointly and dealing with representatives of

all Class I railroads (A. 61-62, 71-75). And the Switchmen's Union participates, not only by reason of its membership on the National Railroad Adjustment Board, but also by its representation on national disputes machinery under the Washington Job Protection Agreement and the National Vacation Agreement, to administer collective bargaining agreements applicable to the Milwaukee (A. 61-62, 71-75). In the course of these activities the Switchmen have met and dealt with the Milwaukee on behalf of yard service employees of the Milwaukee (A. 57-61, 69-71, 72-75).

The authoritative work in the Trainmen's Union by Joel Seidman, *op. cit.*, pp. 14-15:

> "Although certification under the Railway Labor Act as amended is for a craft or class of employees on a single railroad, the practice of bargaining on this basis has steadily diminished in importance. * * * national bargaining or something very close to it has been engaged in on a craft or joint basis since 1931.
>
> "National bargaining on wages readily accommodated itself to the legal requirements of collective bargaining * * * the real bargaining gets under way with the heads of the cooperating unions on one side of the bargaining table and representatives of the three regional associations of carriers on the other.
>
> "* * * In general it may be said that issues that would have an important impact on the competitive situation of one railroad in relation to another are now handled through national bargaining * * *".

It is thus evident that membership in the Switchmen's Union contributes to the support of collective bargaining for the yard service employees on the Milwaukee. Judge Herlands in his opinion in the district court in the *O'Connell* case, No. 172, this Term, p. 28a, which was adopted by reference by the court below in this case (A. 118) relied upon this sharing of costs, stating:

> "* * * the provision—literally construed—reconciles the problem of intercraft mobility with the primary

> purpose underlying the 1951 amendments to allow for an equitable sharing of the costs of representation. For by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board, membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements'' (footnotes omitted).

The numerous assertions in petitioners' brief, pp. 13, 17, 35, 42, and in the brief of the Brotherhood of Locomotive Engineers, pp. 8-12, that Subparagraph (c) cannot be given a literal reading since the objective was to spread the cost of collective bargaining rests upon the false assumption that membership in a union which does not hold the contract on a given line does not contribute to the support of that collective bargaining. It does so contribute when, as here, that union shares fully in paying for its share of the expenses of joint national bargaining and contract administration. The Brotherhood of Railroad Trainmen so stated in its brief in *Rychlik*, No. 56, October Term, 1956, p. 30, when it stated:

> ''One result of imposing upon the union the obligation of utilizing the procedures of Section 3, First (f) if it desires 'national in scope' status is to remove the possibility of a non-national union enjoying status under the Act without assuming 'its fair share of the burdens and responsibilities attendant upon the administration of the Act.' * * * Most of the financial cost of enforcing the Act and maintaining its administrative processes is borne by the qualified unions. That cost is reflected in the dues of each qualified union.''

Similarly the Brotherhood of Locomotive Engineers in its brief amicus curiae in *Rychlik*, p. 25, fully recognized that any employee who was a member of a union national in scope was not a free rider for it stated:

> "The conclusion thus seems mandatory that the phrases 'national in scope' and 'organized in accordance with the Act' include the requirement that such a union shall be required to assume its duty of establishing its eligibility to participate in the selection of members of the national Railroad Adjustment Board. Before it has established its eligibility, it has not assumed its due responsibility * * * to conclude otherwise would create an immunization of the 'free rider'."

It follows that a literal construction of Subparagraph (c) is entirely consistent with the objective of eliminating free riders.

Indeed it is evident from the legislative history that the free riders at whom the bill was directed were those employees who had never joined any union. Congressman Linehan stated on the floor of Congress during the debate preceding enactment (96 Cong. Rec. 17060):

> "Testimony before our committee was to the effect that some 80 percent of the 1,200,000 railroad employees today are members of a railroad labor organization. Thus it appears this bill is directed at some 250,000 who are not in one of the unions."

Congressman Wolverton stated (96 Cong. Rec. 17050):

> "* * * at the present time there are approximately 1,200,000 employees of our railroads. Of these between 75 and 80 percent are members of one or another of the railway labor unions. Thus 20 or 25 percent, who are not members of any union, are enabled to share in all benefits derived from union bargaining without bearing any part of the expense incident to obtaining such benefits. It is only fair to provide that benefits and responsibility should be jointly shared by all."

Other Congressmen similarly explained the bill as directed only at employees who do not belong "to one of the brotherhoods" (Congresman O'Hara, 96 Cong. Rec. 17052)

and "who are not now in one of the unions" (Congressman Harris, 96 Cong. Rec. 17050).

The fact that the aim of Subparagraph (c) was solely those employees who were not members of any union is evident from the proviso which singles out this group as the only one which must join the union holding representation rights. The logic of this is clear. Those employees who have never shown enough interest in unions to join any union can properly be required to join the bargaining agent when the first union shop agreement is signed. These are the only free riders. They cease being free riders by joining the contracting union. Requiring them to join the contracting union does no violence to any choice of unions which they previously exercised, for it is this group that never chose any union. If after joining the contracting union, they have a preference for another of the standard operating unions the last proviso to Subparagraph (c) guarantees them the right to change membership to any other standard operating union.

The scheme of Subparagraph (c) thus confirms the legislative history which shows that membership in any one of the standard operating unions was regarded by the supporters of Subparagraph (c) as adequate support for collective bargaining activities.

III.

A LITERAL CONSTRUCTION OF SUBPARAGRAPH (c) OF SECTION 2, ELEVENTH, AFFORDS A TYPE OF UNION SECURITY WELL SUITED TO THE NEEDS OF THE OPERATING EMPLOYEES.

A. Traditional Forms of Union Security Have Historically Been Regarded as Unsuited to Operating Crafts on the Railroads.

The absence of union security agreements on the railroads prior to 1950 was a well known fact. At the beginning of his testimony on the bills which became Section 2, Eleventh (c), George M. Harrison, appearing on behalf of the Railway Labor Executives Association, testified that prior to 1934 the unions had the "same right as any others in outside industry to bargain for union security" but "it was seldom exercised." Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H. R. 7789, p. 9; Hearings before a Subcommittee of the Committee on Labor and Public Welfare, Senate, 81st Cong., 2nd Sess., on S. 3295, p. 12.

In 1934, when the amendments which illegalized union security on the railroads were being considered the only union security agreements with standard railroad unions were described as 23 "percentage" contracts held by the Brotherhood of Railroad Trainmen. Joseph B. Eastman, Federal Coordinator of Transportation testified (Hearings before Committee on Rules, House, 73rd Cong., 2nd Sess., on H. R. 9861, p. 22):

> "It happens that one of these so-called standard organizations, and only one, that is the Brotherhood of Railroad Trainmen * * * has succeeded in getting from the companies so-called percentage contracts

> which provide that in the yards, a certain percent of the men, which is 75 percent, as a rule, and sometimes goes up as high as 100 percent, shall be members of the Brotherhood of Railroad Trainmen. In other words, it was a closed shop or partially closed shop agreement. I believe there are about 23 of these and they are the only instances I know of such a contract as far as standard organizations are concerned."

James A. Farquahason, representative of the Brotherhood of Railroad Trainmen was definite in his testimony that his organization had 23 percentage contracts. Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650, 73rd Cong., 2nd Sess., pp. 84-87, 93, 94; Hearings before Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., pp. 199-200, 1 Leg. His. NLRA 1935, pp. 1579-80). For a court decision upholding the validity of two of the Brotherhood of Railroad Trainmen's percentage contracts see *Underwood* v. *Texas & P. Ry. Co.,* 178 S. W. 38 (Tex. Civ. App., 1915). The court's opinion describes the contracts as respectively requiring at least 85 percent and 75 percent of the yard employees to be members of the Brotherhood of Railroad Trainmen.

We mention the percentage contracts because they constitute a precedent in the operating crafts for a form of union security which permitted a substantial minority within the unit to belong to some other union. Both Federal Coordinator Eastman and the court in the *Underwood* case named the Switchmen's Union of North America as the minority union involved.

Reverend Jerome L. Toner, The Closed Shop in the American Labor Movement (Catholic University Press, 1941), a doctoral dissertation, describes the traditional form of union security agreement in its application to operating employees as "impossible and unexpedient" (p. 93).

B. Prior to Consideration of Union Shop Amendments to the Railway Labor Act by Congress, a Multiple Choice Union Shop Had Been Suggested as a Possible Form of Union Security Suitable for Operating Employees on the Railroads.

Reverend Toner in his above cited doctoral dissertation, which was published in 1941,. suggested a solution for the difficulties of applying union shop agreements to the operating employees on railroads. He stated (*op. cit.*, p. 104):

> "A logical solution for making the closed shop contract possible might be found * * * in insisting that all men working as engineers or firemen, conductors or trainmen, be members in good standing of one brotherhood or the other."

C. The Numerous Losses of Representation Rights by the Traditional Craft Union for Its Own Craft During the 1934 to 1950 Period Explains Why the Operating Unions Refused to Support a Bill Which Did Not Guarantee Multiple Choice of Membership in Any One of the Standard Operating Unions.

We have collated from the annual reports of the National Mediation Board a table printed as an Appendix at the end of this brief which shows all the instances, from the time the National Mediation Board began to determine bargaining units until the date of the enactment of the union shop amendment, in which the traditional craft union lost its representation rights with respect to the craft which it traditionally represented. This table shows a total of 544 instances during this period, involving 64 railroads, in which one of the operating unions held both the representation rights for the craft which it traditionally represents as well as the representation rights for a craft

which had traditionally been represented by another operating union. The correlation between the years of low employment and representation of both units by the union representing the higher craft or senior employees as contrasted with the years of high employment and representation by the union representing both units by the union representing the craft of junior employees, establishes that the shift in representation was undoubtedly due in most instances to shifts of employees from one unit to another by operation of seniority rather than to changes in the union affiliation of employees.

It was for this reason that the operating unions did not want a bill which put any restrictions on the right of each operating employee to continue to belong to the union of his own choice without any requirement he join any other union. There is no basis for concluding that even with respect to the Trainmen that Mr. See's draft of a proposed amendment represented anything but a first ill considered attempt at a solution which was hastily abandoned as soon as its unsuitability in the light of historical practices on the railroads, was made plain.

The argument advanced (Brief of Locomotive Engineers as Amicus Curiae, p. 19, n. 15) that "the same situation exists in the non-operating crafts and in bargaining units under the jurisdiction of the National Labor Relations Board," where the winner takes all. But we know of no instances outside of the operating crafts on the railroad where sufficient employees hold seniority in two different crafts, to make the identity of the majority representative depend on whether times were good or bad economically. If such situations exist it may be necessary to devise a special multiple choice union shop for the industry involved.

D. The Multiple Choice Union Shop Afforded by a Literal Construction of Subparagraph (c) Is Entirely Beneficial in Result.

In view of the essentially national character of most bargaining, with all operating unions joining both in negotiation and administration, the multiple choice union shop spreads the economic burden fairly over all employees who share the benefits.

The strong public policy in favor of according freedom of choice to each employee can thus be given effect without creating a group of "free riders."

The availability of alternative union membership tends to spur the union to continuously serve each of its members to their full satisfaction. As Seidman stated in his book on the Brotherhood of Railroad Trainmen (*op. cit.*, p. 17):

> "Where the Brotherhood has a union shop clause in effect, therefore, a worker may hold his job by belonging to the unions of the Conductors or the Switchmen, if for any reason he finds the Trainmen's organization not to his liking. This gives the member a certain independence in his relation to the union, and forces the officers to be more responsive to the desires of the membership and more considerate of their feelings than they otherwise might be."

These are certainly desirable results. There is nothing absurd or unreasonable about the form of union shop afforded by a literal reading of Subparagraph (c).

CONCLUSION.

There is not the slightest basis for refusing a literal reading of Subparagraph (c). The innovation a literal reading provides accords fully with historical practices on the railroads. For fifteen years after its enactment the operating unions which drafted Subparagraph (c) assumed it was intended to apply literally. They did so apply it. No ill effects have been recorded. Instead its effects have been praised. Accordingly the judgment below should be affirmed.

Respectfully submitted,

LEE LEIBIK,
RUTH WEYAND,
343 South Dearborn Street,
Chicago, Illinois 60604,
Attorneys for Respondents.

December 27, 1968.